

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NFI INTERACTIVE LOGISTICS, LLC

and

Case 25-CA-31011

MICHAEL H. BURT, an Individual

Rebekah Ramirez, Esq.
for the General Counsel.
James R. Redeker, Esq. (Duane Morris LLP),
of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Terra Haute, Indiana, on October 6, 2009. The charge was filed May 11, 2009, and amended on June 29 by Michael H. Burt, an individual (the Charging Party) and the complaint was issued July 31. The complaint alleges that NFI Interactive Logistics, LLC (the Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by informing employees that it would be futile for them to select a union as their bargaining representative; and informing them that it disciplined employees who engaged in protected concerted activities, including speaking with other employees about terms and conditions of employment. The complaint additionally alleges that the Respondent violated 8(a)(1) by issuing Burt a written discipline and thereafter discharging him for engaging in protected concerted activities. The Respondent timely filed an answer to the complaint essentially denying the commission of any of the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

JURISDICTION

5 The Respondent, a limited liability company, with an office and place of business
in Terre Haute, Indiana, where it has been engaged in the business of transportation
logistics and distribution of goods. During the 12 months preceding July 31, 2009, the
Respondent in conducting its business operations described above performed services in
10 excess of \$50,000 in States other than the State of Indiana. The Respondent admits and I
find that it is an employer engaged in commerce within the meaning of Section 2(2), (6),
and (7) of the Act and that the International Brotherhood of Teamsters, local 135 (the
Union) is a labor organization within the meaning of Section 2(5) of the Act.

15 I ALLEGED UNFAIR LABOR PRACTICES

A. Overview

20 The following findings are predicated on the credited and undisputed testimony of
Gene Dooley, the Respondent's director of operations, and Michael Burt, the Charging
Party. Dooley was the first employee hired at the Respondent's Terre Haute facility when
it opened in January 2000. He was hired as the operations manager, and was the project
manager before he assumed his current position in late 2005. The Respondent's Terre
Haute facility only services Staples, and its office is located within the Staples Midwest
25 Distribution Center building. (R. Exh. 1.) Dooley described the Respondent's function
as loading the maximum amount of product on each trailer and creating a route to deliver
the product at the least cost. Employees referred to as "optimizers" determine the amount
and type of product that needs to be loaded on the trailers and the routing of the trucks to
the various Staples stores. The optimizers then create a shipping manifest which contains
30 the foregoing information as well as the approximate time of the delivery. The shipping
manifest is given to the Respondent's dispatchers, and to employees of Staples in order
for them to notify the individual stores.

35 Before 2006 the Respondent performed its duties without input or oversight from
Staples. Sometime in 2005 or 2006, Dooley was told by the Respondent's president that
the Respondent had lost the Staples account. While Dooley was preparing to vacate the
facility, he was queried by Staples' personnel concerning employees of the Respondent
that Staples was interested in hiring. They also solicited his opinion regarding a different
business model that Staples was considering. Notwithstanding the foregoing, for a reason
40 unknown to Dooley the Respondent retained the account. Staples did, however, assign a
"traffic manager" to be a liaison between itself and the Respondent. The assignment of
the various traffic managers has resulted in them implementing numerous changes to the
Respondent's methods of operation. The changes initially involved the frequency of
deliveries and the routes to make the deliveries. There have been four traffic managers
45 and each has been increasingly more domineering and involved in the Respondent's
business. The traffic managers have never specifically designated the drivers for the

individual routes. Nor is there evidence of any interaction between the drivers and the traffic manager. The drivers normally go to at the Respondent's office to pick up and return the truck that they drive. John Espieg was the traffic manager at the time of the trial and has held that position since December 2009. (Tr. 160, 270.) He is the first traffic manager to have a Staples analyst assigned with him. The Respondent's optimizers are expected to comply with directives from the traffic manager. Dispatchers cannot deviate from the shipping manifest once it has been approved by the traffic manager, unless he authorizes the change. Espieg appears to tolerate dissent even less than the previous traffic managers, and he is more aggressive in implementing change. Although the traffic manager may not have the authority to terminate the Respondent's contract, his recommendation, as Staples "man on the ground," would undoubtedly weigh heavily. Accordingly, in Dooley's view the Respondent has little choice but to acquiesce.

Not everyone agreed with the acquiescence policy. In early 2008 Dooley needed to hire a project manager. (Tr. 64-66, 93.) The candidates were Rand Walden, an optimizer for the Respondent, and Burt. Burt was hired as a driver by Dooley. At a point in time Dooley had chosen Burt to assist him on a special assignment in California. Burt had never been disciplined, and had received a bonus all but twice during his eight years of employment. He was one of the most senior of the 57 drivers and had far more experience than Walden. Notwithstanding his experience and qualifications Dooley selected Walden. Dooley believed that Burt would jeopardize the Respondent's already tenuous position with Staples. Burt had been telling Dooley, in essence, that the Respondent needed a person with gumption to tell Staples that the Respondent would no longer tolerate the traffic manager's rapid and frequent changes. When Dooley told Burt that Walden was selected, Burt said Walden was an idiot. He explained that he meant that Walden would be a "Yes man," unlike Burt who would talk to Staples and help guide them to greater revenue.

B. Burt's Final Written Warning

1. Background

In April 2008, probably after being rejected for the project manager's job, Burt met with a union representative in Terre Haute. He was given union authorization cards to distribute among the drivers. Burt also signed an undated card. (GC Exh. 7.) Burt contacted the Union because he was concerned by the Respondent's ongoing changes to the drivers terms and conditions of employment. All of which, in Burt's view, were for the worst. The most recent changes ended the bidding procedure for the selection of route assignments, lowered the truck speed, and reduced the time that a driver could idle his truck engine. Burt testified that he contacted approximately 20 drivers by phone and in person during the spring of 2008. Driver Tom Dorris testified that Burt solicited him to join the Union in 2008, and driver John Parris confirmed that Burt asked him to join the Union during the spring of 2008.

On August 26 Walden sent an email to Dooley. Dooley was in California where the time was 12:33 p.m. PDT. Walden's email references a conversation with Parris, that

seems to have occurred on the same day that he sent the email. Walden says Parris related to him that he was asked by employee Brian Roberts if he would attend a meeting that Walden and Bob Stultz, the supervisor of the drivers, were scheduled to have on September 8, with Burt and Roberts. (Tr. 6.) Roberts functioned as an informal liaison between the drivers and management. He was not employed by the Respondent at the time of the trial. Stultz was a friend of Burt's. He was employed by the Respondent, in the same capacity, at the time of the trial. Parris said Roberts invited him because he had been a union driver and that "he would know about meetings like this."

Walden also wrote, in a separate paragraph, that he had been informed by another employee that she had overheard Burt talking with other drivers about forming a union. Walden writes "So now I know for sure exactly what they want to meet about." Walden concludes by asking, "[i]s that enough to act on." (GC Exh. 6.) Dooley says that he told Walden "to blow it off," by that he meant "don't worry about it. I'll be there. It's no big deal." (Tr. 89.)

Burt called Dooley, regarding an ongoing issue with Walden, sometime in August. The call lasted about 15 minutes. During that time Dooley told Burt that "he didn't want to hear anything more about the union, any more union talk." Burt replied that he really did not want a union but was tired of the way the drivers were being treated. Dooley said "that if there was ever a union in there [NFI] would pull out." (transcript is corrected.) Burt replied "[A]ccording to the pamphlet I'd gotten from the union, you can't tell me that." Dooley said "I never told you anything." (Tr. 197.)

The September 8 meeting occurred as scheduled in a motel in Terra Haute, with Dooley as an addition to the management team. Burt testified that he and Parris were sitting at one end of the room with Parris sitting by the kitchen counter and Dooley "sitting kind of caddy cornered between us." Roberts, Walden, and Stultz were at the other end of the room. It was early in the meeting and the groups were having general conversations among themselves. According to Burt it was during this time that Dooley once again took the opportunity to tell him that he did not want to hear anything more about a union. Burt claimed that he gave a response similar to the one that he claims to have given to Dooley in August "I don't really want a union, but . . . we're trying . . . to get to where we don't need a union to represent us. If we can reach agreements through just talking amongst ourselves, we don't need a union." Dooley, did not respond. The meeting continued for several hours. Although no substantive issues were resolved Burt was optimistic. He wanted to give the Respondent an opportunity to resolve the issues without him having to resort to a union. Consistent with his belief he stopped his organizing for several months.

The Respondent does not directly refute or address Burt's testimony regarding his August conversation with Dooley. At best Dooley said that he did not recall ever making the statement that the Respondent would pull out if the Union came in. The Respondent's attempts to impugn Burt's testimony by arguing that he exhibited a suspicious lack of recall regarding anything other than comments about the Union. I disagree. Burt remembers that he called Dooley about an ongoing issue with Walden. It appears from

the record that there were many ongoing issues with Walden and I am not surprised that he could not remember the specific issue. Moreover, after he was asked an initial question he was only asked questions about who said what regarding the Union. He exhibited an excellent recollection and that also is not surprising. He had been reading a pamphlet from the Union apparently about organizing. What Dooley was saying was very important to him. He told Dooley, based on what he had read in the pamphlet, that he should not have told him the Respondent would pull out if the Union came in. Clearly he was paying close attention to what was said. I find Burt to be a credible witness. I find specifically that Dooley told him to stop talking about the Union and I find that Burt told Dooley that he really did not want a union but was tired of the way the drivers were being treated. In response Dooley told him that the Respondent would pull out if the Respondent's work force became unionized.

Parris corroborated Burt's testimony that Dooley told him to stop talking about the union during the September meeting. Roberts is no longer an employee and did not testify. Walden categorically stated that "union" was not spoken at the meeting. Dooley claims that he did not recollect anybody mentioning "union." It is possible that Walden did not hear Dooley tell Burt to stop talking about the Union. He was sitting at the other end of the room from Dooley. Stultz who was also sitting in that area did not testify. I find that Burt's testimony, as corroborated by Parris, is credible. It is consistent with his testimony concerning the conversation he had with Dooley in August. It makes sense that Dooley would want to reinforce his message in person and that he would want to get the meeting off on the right foot, i.e., I will work with you as long as you do not talk about a union. Parris also testified that Burt did not make a response after Dooley told Burt to stop talking about the Union. Accordingly, I do not credit the portion of Burt's testimony where he claims to have again told Dooley that he did not want a union if they could work out their differences. I do not find that Burt was prevaricating but that Parris had a better memory of this incident. I also note that it is axiomatic that a witness may be believed as to some but not all of his testimony. E.g., *Kentucky River Medical Center*, 355 NLRB No. 129, 15 fn. 28 and cited cases (2010). Parris was an excellent witness. His testimonial demeanor was that of an honest, and earnest, individual who told the truth without bias or exaggeration. I have total confidence in the truthfulness of his testimony. Moreover, Parris is a current employee of the Respondent and not a discriminatee in this case. Therefore, where his testimony is adverse to his employer it is considered to be against his self-interest and thus more worthy of belief. *Meyers Transport of New York*, 338 NLRB 958, 968 (2003) and cited cases.

I also find that last sentence of Walden's email is evidence of animus. The information in the email confirms Walden's suspicions—"So now I know for sure exactly what they want to meet about." Contrary to his testimony he is not asking "is there something I need to do, or what should I do." He is asking Dooley if Dooley is satisfied that the information contained in the email is sufficient for him to take action. He is not asking what action should be taken. Dooley tells Walden to stand down, that he will come to the meeting and take care of the situation. Dooley already knows what he is going to do, and that action was articulated in the August phone conversation with Burt, and reiterated at the September 8 meeting, when he told Burt to stop talking about the

Union. I also find that the contents of the email imply that it was part of an ongoing discussion. Thus, it appears that at some point in the past Walden wanted to act on his suspicions but, just like this time, he was restrained by Dooley. Now that his suspicions have been confirmed Walden repeats his call for action. Dooley tells him not to take Burt seriously, and that he will take care of the problem. Walden's wait is not long.

Burt testified that he never heard anything more about the issues discussed at the September 8 meeting. On January 1, 2009, the drivers were notified that the Respondent had changed the policy regarding vacation time. Also during January Burt complained to Walden and Brett Korenski, a dispatcher, that Staples was not properly paying the Respondent, and consequently Burt, for adding a delivery in Nacogdoches, Texas, to his route. Consequently Burt resumed his organizing activities by calling the drivers. His mobile phone records demonstrate an increase in his calls from 121 between December 17 to 31, 2008, to 167 during the first 15 days in January 2009, and 162 calls during the last 15 days in January. Burt credibly testified that he talked with drivers Rick Roberts, Brian Roberts, John Parris, Tom Dorris, and Brian Morses, as well as several other drivers and yard men Steve Johnson, and Jerry Rosslerand. (Tr. 201-202.) Burt testified that he spoke about various issues with these individuals and that most were upset about the speed of the trucks being lowered that caused them to take longer to complete their deliveries.

Just before January 29 Stultz called Burt to warn him to "watch his back" because Walden was keeping track of everything Burt said and did. Burt was making deliveries when Stultz contacted him. A couple of days later Burt returned to the Respondent's office. The office is small and the employees sit close together. Burt went to over to Korenski and said "I heard that Rand's keeping track of me." Korenske shook his head "yes," and Burt left.

2. Walden issues Burt a final written warning

On January 29, 2009, at approximately 6 p.m. Burt walked pass Walden's office on his way to turn in his paperwork after making his deliveries. Walden said "Before you get out of here, I need to talk to you." Burt stopped and Walden said "Well, I'm not quite ready for you yet." Burt sat down outside and began talking to Stultz until Walden called him into his office and closed the door. Stultz did not come into the office.

Walden handed Burt a two-page printed document, that also contained typed and hand written words. The document had an NFI logo in the upper left corner and COUNSELING/CORRECTIVE ACTION PLAN, printed across the top. Burt's name is typed after Employee Name, and "Counseling Session" is dated 01.29.2009. "Bob Stultz" is typed after "Others Present." Following his name is a handwritten annotation "Bob was not present at this counseling," followed by Walden's signature. The time frame for improvement is: "Final written warning; no further exceptions." Typed after the statement of the problem is: "Mike constantly calls the office to criticize the way his load is built each week, and has repeatedly criticized me, Gene Dooley (Director of Operations) and NFI Logistics policies and procedures. This is insubordination." Typed

after previous meetings and dates when this problem has been brought to the employee's attention is typed "This has been going on for quite some time, and all drivers were warned about violating NFI's Driver Conduct policy before." The following section is typed beneath the previous sentence. "In the Driver's Manual, it states 'Unprofessional behavior or language with any of NFI Interactive Logistics customers or employees will not be tolerated and will be subject to immediate discipline, up to and including termination.'" "Documentation/supporting evidence to verify problem: Forwarded to HR: 'Mike Burt.doc'" After "[t]he employee understands the problem as stated" the "Yes" line is checked. After "The employee agrees this is indeed a problem or deficiency" the "No" line is checked. "Note on the employees point of view or explanation:" is blank as is "Extenuating circumstances:" "No" is marked after "The employee will be referred elsewhere for counseling." On the second page "The employee's suggestions on action to be taken," is blank. The Employee Signature line is signed and dated as is the Manager Signature line, although both appear illegible to me. (GC Exh. 3.)

After reviewing the document Burt asked Walden what it was about. According to Burt, Walden said that he was being disciplined for violating company policy by talking to other drivers. Burt said that he had never seen anything in writing that prohibited him from talking to his coworkers. Walden said that the policy was that you cannot talk to coworkers about the work situation. Burt also objected to being called insubordinate. He said that he had followed every order that Walden had ever given to him. According to Burt, at this point Walden got frustrated and said that he was "not going to have a jackass truck driver tell him how to run the company." Burt replied, "so now after 25 years of driving, I'm reduced to a jackass." Burt testified that Walden said "there never has been a union here, there never will be a union here, and that's it, this is your final warning." Walden told Burt that if wanted to object to anything he had to write it down then and there. Burt, after driving 700 miles and just learning of a death in his family, felt that he was too dumbfounded to write anything. He told Walden that he wanted to take the document to his attorney's office. Walden refused and told Burt that if he wanted to refute anything that was said it had to be done on the spot or his objection would not be heard. Burt estimated that the meeting lasted 30-45 minutes.

Burt left the facility and called Stultz. He asked Stultz why he was not at the meeting when his name was typed on the first page as an attendee. Stultz said that Walden told him that he did not want him in the room. He also was surprised at the insubordination accusation and agreed with Burt that there was no policy preventing employees from talking among themselves. After talking to Stultz, Burt called Dooley. Burt testified that Dooley acknowledged that he knew that Burt was going to be reprimanded and that he knew the story behind it. Dooley advised that he should calm down and "stop what you're doing." He explained that "it's not too late to save your job if you stop what you're doing."

C. The 8(a)(1) Allegations

Based on the foregoing, paragraph 5(a) of the complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Walden told Burt that it would be futile for the employees to select a union as a bargaining representative because “there never has been a union here, there never will be a union here, and that’s it.” Paragraph 5(b) of the complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Walden told Burt that he was being disciplined for engaging in protected concerted activities, including speaking with other employees about their terms and conditions of employment.

Section 7 of the Act (in pertinent part) provides that employees can join unions and bargain collectively. Section 8(a)(1) of the Act provides: “It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.” It is well settled that the test for determining whether an employer’s statements or actions violate Section 8(a)(1) is objective. Thus, the employer’s intent or motive is irrelevant, as is the success of the unlawful statement or conduct. Rather, the test is whether the employer’s conduct or statement “may reasonably be said to have a tendency to interfere with the exercise of employee rights under the Act.” *El Rancho Market*, 235 NLRB 468, 471(1978), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959). The statements set forth above satisfy this objective standard. Telling employees that the Respondent has never been organized by a union and never would be, would reasonably convey to employees that it was futile to attempt to obtain union representation. *Venture Industries*, 330 NLRB 1133, 1133 (2000), citing *Maxi City Deli*, 282 NLRB 742, 745 (1987) (employer’s comment that “there would never be a union at his restaurant” found unlawful); *Wellstream Corp.*, 313 NLRB 698, 706 (1994) (telling employees that no one “would bring a union in” and that the employer would see to it that the company “was never unionized,” conveyed to employees the futility of their support of the union.) It is obvious that if employees were told that they would be disciplined for engaging in protected activity, including talking with coworkers, that would reasonably interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7. Generally, an employer must demonstrate that a legitimate and substantial business reason exists to justify the intrusion on employees’ Section 7 rights. Even then the prohibition must not be overly broad and should be narrowly tailored and limited in time and scope. None of which was done in this case. See generally, *BCE Construction*, 350 NLRB 1047, 1047, fn. 4, 1052 and cited cases (2007); *Caesar’s Palace*, 336 NLRB 271, 272 (2001); *Lockheed Martin Astronautics*, 330 NLRB 422, 423 (2000); *Brunswick Corp.* 282 NLRB 794, 795 and cited cases (1987). Thus, all that remains is to assess credibility.

Burt’s testimonial demeanor was that of a trustworthy and forthright individual. He demonstrated excellent recall and gave a full and frank account of what he said and what was said to him, without apparent bias or embellishment. Walden’s demeanor by comparison was that of a person who was guarded in his responses and appeared to have little interest in giving his version of what was said during his meeting with Burt on

January 29. Set forth below is the initial exchange between the Respondent's council and Walden regarding the meeting.

5 Q. By the way, going back in your mind to the written warning, did you talk to Mr. Burt when you gave him the written warning on January 29th?

A. Yes , I did.

10 Q. And did he respond when you gave him the written warning and told him what it was for?

A. He didn't agree that what we were talking about was right. He said if I remember right that he had a right to say whatever he wants, it's a free county.

Q. He could say whatever he wants. Did you at any time ever say to anyone that it would be futile for employees to join a union?

15 A. No.

Q. Did you ever at any time say to anyone that they would be disciplined or discharged if they talked about the terms and conditions of their employment?

20 A. No.
(Tr. 147-148.)

25 Walden testifies without providing context. His most expansive answer is after he denies telling Burt that Burt was being disciplined for talking to other drivers. He is asked what he did tell Burt. He answers, "I told him he was being disciplined for being abusive with other employees." He goes on to deny saying that there would never be a union at NFI. But he equivocates when asked if he mentioned union. He replies "I don't believe so." Similarly, when asked if the issue of a union was raised during the discipline meeting he responds, "Not that I recall." (Tr. 335-336.)

30 I am also troubled by the fact that the Respondent failed to call Stultz, a current supervisor, as a witness. He was listed on the discipline form as being present. Walden wrote, without explanation, that Stultz was not present. When asked why Stultz did not attend Walden said, "he was at his desk working with another driver issue." Not only is that answer lame, but it contradicts Burt's testimony, without addressing that testimony.

35 Burt credibly testified that after Walden told him that he was not ready to meet, Burt went outside and talked with Stultz, until he was summoned by Walden. Later that evening Stultz told Burt that Walden said that he did not want him at the meeting with Burt. According to Walden he had previously told Stultz to give Burt verbal warnings. A fact that the Respondent considers "especially noteworthy that it was Stultz 's long-

40 time friendship with Burt that resulted in Walden's decision to use him as a vehicle for delivering the warning to Burt." (R. Br. 10.) It appears that it would be just as noteworthy to have Stultz as a witness when Burt was given the final warning, especially since Burt credibly denied that he ever received any prior warnings of any kind from anyone.

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“[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.” *International Automated Machines*, 285 NLRB 1122, 1123 (1987), 861 F.2d 720 (6th Cir. 1988) enfd. mem. (citations omitted); *Kentucky River Medical Center*, 355 NLRB No. 129, slip op. at 12 and cited cases (2010); *Electrical Workers Local 3 (Teknion, Inc.)*, 329 NLRB 337, 337 fn. 1 (1999).

Based on Burt’s credited testimony that Stultz was available to attend the meeting and that Walden told him not to attend, I infer that the reason for Walden’s action was to prevent Stultz from hearing his unlawful statements. Accordingly, I have considered the foregoing, as well as Walden’s overall poor demeanor, when assessing his credibility. I conclude that Burt is a more credible witness than Walden. Consequently, I find that Walden made the unlawful statements as alleged and that the Respondent has violated Section 8(a)(1) of the Act. The test, as set forth above, is objective but it should be noted that Burt was subjected to the unlawful statements in the midst of being given a final written warning by the top ranking management official in that official’s office at the facility. I have also found that on two other occasions Burt was told by Dooley not to talk about the Union with the other drivers.

D. The 8(a)(3) Allegation

The complaint also alleges, and the counsel for the General Counsel argues, that the Respondent issued Burt the final written warning because of Burt’s protected concerted and union activities, and therefore the Respondent has also violated Section 8(a)(3) of the Act.

In determining whether employer conduct violates Section 8(a)(3) of the Act the Board applies the causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). In *Wright Line*, the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that the employee’s protected conduct was a motivating factor(in whole or in part) for the employer’s adverse action.

Proof of discriminatory motive can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Foods Services*, 343 NLRB 1183, 1185 (2004). This includes proof that the employer’s reasons for the adverse personnel action were pretextual. *Rood Trucking Co.*, 342 NLRB 895, 897–898 and cited cases (2004). See also *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) (“when the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . the factfinder may not only properly infer that there is some other motive but that the motive is one that the employer desires to conceal—an unlawful motive . . .”) (citing *Shattuck Denn Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1996) (internal quotations omitted)).

To meet the General Counsel's initial burden the General Counsel must offer credible evidence of union or other protected activity, employer knowledge of this activity, and the existence of union animus. *Briar Crest Nursing Home*, 333 NLRB 935 (2001). Once the General Counsel meets the burden under *Wright Line*, the burden shifts to the Respondent to establish that it would have taken the same action even in the absence of union activities.

The evidence presented to satisfy the General Counsel's initial burden must be analyzed separately from the evidence presented in the Respondent's defense. *Precision Industries*, 320 NLRB 661 (1996), *enfd.* 118 F.3d 585 (8th Cir. 1997). Nevertheless, an employer's stated reasons for an adverse employment action against an employee can be considered as a part of the General Counsel's initial burden, and if those reasons are pretextual, they can support an inference that the employer had an unlawful motive. *Black Entertainment Television*, 324 NLRB 1161 (1997). The entire record may be examined to ascertain whether the adverse employment action was motivated by protected activity. Thus, in determining whether the evidence presented has satisfied the General Counsel's initial burden the evidence is not limited to the evidence introduced by the General Counsel, but can also include the reasons advanced by the Respondent for the adverse action and any additional evidence offered at the hearing by the Respondent. *American Gardens Management Co.*, 338 NLRB 644 fn. 5 (2000); *Williams Contracting*, 309 NLRB 433 (1992).

It is also appropriate to note that a finding of pretext "defeats any attempt by the Respondent to show that it would have taken the same adverse action absent the employees union activities." *Rood Trucking Co.*, *supra* at 898; *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). "This is because where the evidence establishes that the reason given for the Respondent's action are pretextual—that is, either false or not in fact relied on—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line*, analysis." *Rood Trucking Co.*, *supra*, and cited cases.

The Respondent does not dispute that it was aware of Burt's union activity from mid-2008 until early September 2008. The Respondent denies knowledge after that period. Burt's mobile phone records demonstrate that his calls to other NFI drivers increased significantly during January 2009. One of the drivers Burt talked with was John Parris. Parris credibly testified that he spoke in person with Burt about the Union, at some point in time, after the September 8 meeting with management. Similarly when the counsel for the General Counsel asked if he had occasion to talk with Burt on the phone he said "yes." When he was asked if that conversation was about the Union Parris answered by saying how frequently he talked with Burt. The implication was that he talked with Burt about all manner of things to "kill the monotony." Parris later testified that he spoke with Burt at least twice a day the month before Burt was discharged. Parris admitted that he also voiced his discontent with the truck sped to Walden and Dooley. Burt testified that many of the drivers that he spoke with were unhappy with that change.

I am satisfied that Burt was talking with the drivers about the Union and their terms and conditions of employment during January 2009. I am also willing to infer that Walden knew of this fact. Near the end of January Stultz warned Burt that Walden was keeping track of everything Burt said and did. Burt confirmed Stultz's statement with
 5 Korenski, a dispatcher who worked in the office. Walden did not deny Burt's testimony and neither Stultz nor Korenski testified. I find that Walden was keeping track of Burt because of his union and protected activity. I find that this is evidence of knowledge as well as animus. I also believe that Walden mostly acquired his knowledge of Burt's activities the same way he confirmed that the September 8 meeting was about the
 10 Union—employees told him. One of whom was Parris, who was in constant daily contact with Burt and who apparently was not at all reluctant to tell Walden that the September meeting was about the Union. Moreover, even in the absence of direct evidence of knowledge, the suspicious timing of the discipline, less than a month after Burt resumed his union activity, and learned that Walden was watching every thing he
 15 said or did, and had instructed others to do the same, gives rise to an inference of the Respondent's knowledge of Burt's union and protected concerted activity. *La Gloria Oil & Gas Co.*, supra at 1123.

Animus is established by both the 8(a)(1) violations that were committed by
 20 Walden when he issued Burt the final written warning. Although the statements that follow were made outside the Section 10(b) 6-month limitations period, they may still be considered as background evidence of animus towards the employee's union support. E.g., *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 52 (2003). Thus animus is also shown by both statements made by Dooley that he wanted Burt to stop
 25 talking about the Union, by Dooley's statement that if the Union came in the Respondent would pull out, and Walden's email call to action against the identified union adherents.

I find that the foregoing evidence demonstrates the Respondent's animus towards the Union and is more than sufficient to support a finding that this animus played a role
 30 in the final written warning given to Burt. I find that it also supports a finding, as the counsel for the General Counsel argues, that Respondent's proffered reasons for the discipline are pretextual. I will briefly review some additional evidence of pretext.

Walden testified that Burt was given the final written warning for insubordination
 35 and being abusive to other employees. (Tr. 114, 336.) The final written warning claims that Burt was insubordinate because he calls the office weekly and criticizes the way his load is built and has repeatedly criticized Walden, Gene Dooley, and NFI Logistics policies and procedures. (GC Exh. 3.) The Respondent admits that Burt has never disobeyed an order. The "load build" determines the amount of money that the driver is
 40 paid and the length of time to complete the run. Both are terms and conditions of employment. Walden admitted that any insulting statements that were made, were not made to him. The evidence submitted by the Respondent to establish that Burt repeatedly called the office to complain about his route are three emails allegedly written by Korenski. They were admitted over the counsel for the General Counsel's hearsay
 45 objection in anticipation that Korenski would testify. Korenski did not testify and no explanation as to why he was not called was offered by the Respondent. The notes

Walden allegedly relied on appear to be summaries of what other people allegedly told Walden. All of which establish that Burt was complaining about his terms and conditions of employment. Walden claims that he told Stultz to issue a verbal reprimand to Burt. In addition to the total absence of any credible evidence that Burt was ever reprimanded by anyone, the record also establishes that Walden never asked Stultz what, if anything, was Burt's response to the verbal warnings.

Insubordination is one of the most egregious offenses an employee can commit. It is normally predicated on a direct refusal to perform an assigned work task. E.g., *Tri-Tech Services*, 340 NLRB 894, 901 (2003). Aside from Walden's characterization of criticism as insubordination, he admittedly never confronted Burt when the alleged insubordination occurred, he took no written statement from his informant, nor did he make notes, he never identified the informant, nor did he ever tell Burt the words that Walden considered to be insubordinate. It is important to note that there is no contention that Burt ever lost the protection of the Act, or is there any evidence that his conduct was so egregious as to render his protected concerted activity unprotected. I find that Walden's use of "insubordination" in this context, is an attempt to convey that its final written warning had substance rather than being a complete sham. Moreover, by applying the label of "insubordination," to the discipline the Respondent could "justify" shortcutting its progressive discipline system. I also find that this ruse makes Dooley's testimony to appear to be glaringly disingenuous. Dooley claims that the Respondent works hard to get and keep good drivers, that it spends thousands of dollars recruiting and training its drivers, and that the last thing it wants to do is to lose a quality driver, are belied by the Respondent's actions. (Tr. 333.) Had the Respondent's reasons not been pretextual it would have applied its progressive discipline system for the very reasons espoused by Dooley.

It appears that the Respondent is contending that the two dispatchers were the primary object of Burt's ire. The failure of the Respondent to call Korenski as a witness leads me to believe that he, like Stultz, would not have aided the Respondent's case or corroborated its witnesses. Steven Trotzke, the other dispatcher did testify. His title is driver supervisor. He said that if Burt was unhappy with his route Burt would be critical, and use vulgarity, but he never tracked the words as much as he could have. Trotzke gave "son of bitches" and "goddamn" as examples. He claims that it was coming "to the point of harassment." Trotzke claimed that Burt would say, "you set the route up any goddam way you want. I'm going to make my deliveries when I can or when I want." Trotzke acknowledged that "we allowed that to continue, his talk." He submitted that Burt would "constantly" used foul language but he could not remember the words used because he did not record them and "he did not dwell on the language." Trotzke agreed that Burt had apologized for his outbursts claiming that they were caused by his frustration with Staples. Trotzke's testimony was not totally incredible. Burt admitted that he swore, but no more than other drivers. Parris corroborated Burt's testimony. Based on Trotzke's demeanor when testifying it was clear that he was trying to make the best case for the Respondent, but he was not able to provide convincing specifics, nor did I hear in his voice the anger or even irritation, that one would expect to hear from an individual who had been harassed for 8 to 12 months. I find that his testimony was

exaggerated and does nothing to demonstrate that the Respondent's actions were anything more than a pretext.

Walden and Trotzke both testified that Burt had been engaging in the same conduct “for a long time” and yet he never received any type of a warning—at least not until he resumed his union and protected concerted activity in early January 2009. It was then the Respondent took action. The conduct which the Respondent had long tolerated was used as a pretext to issue the primary employee union advocate a “final written warning.” Just in case Burt might have missed the real reason for the warning Walden made it patently clear by telling Burt that he was being disciplined because he was talking to other employees about the Union and other protected concerted activities. Walden then repeated Dooley’s admonition that the Respondent never had a union and would never allow a union to represent its the employees.

I find that the Respondent's stated reasons for issuing Burt a final written warning are pretextual and an attempt to disguise the real reason for the warning which was to discourage Burt and the other employees from engaging in union or other protected activity. Accordingly, the final written warning issued to Burt violated Section 8(a)(1) and (3) of the Act.

E. Burt 's Termination

On February 13, 2009, Burt was terminated because a Staples store manager filed a complaint against him. The previous week Burt had attempted to make an early delivery to a store in Texas. The store manager refused because the delivery was a day early and he was expecting a visit from some Staple executives. Notwithstanding the refusal Burt arrived a day early and backed into the loading dock. Once again the manager refused the delivery. Burt asked him if he would “change the seals.” The seals are in place for each delivery as a security measure. Had the manager agreed, Burt could have gone to his next delivery. Burt testified that some managers agree and others do not. This manager, apparently after calling the loss prevention department, refused. Burt waited for most of the day until the truck was finally unloaded. Burt thanked the manager and extended his hand. The manager grudgingly shook his hand and told him that he would no longer accept early deliveries. When Burt arrived at the next store on his route the store manager told him, jokingly according to Burt, that the previous store manager could be an asshole. Burt said that he would have to agree.

John Espieg, the Staples regional manager for transportation at the Terre Haute distribution center was called as a witness by Respondent. Espieg testified that he received an internal email from a member of the Staples customer service team to myself, Walden, and Stultz. (GC Exh. 4.) He received it on the date it was sent, February 9. The email is from the manager of the store who initially refused to accept the early delivery. He writes that he wants to pass along a situation that happened with one of the NFI drivers. He outlines the facts as set forth above. He adds that when the driver “arrived at the next store [the driver] had a few choice words to share about me with the other members of management there.” He continues by complaining that the driver’s lack of

professionalism was completely uncalled for. He closes by thanking the reader for their “attention to this matter.”

Immediately after reading the email Espieg called Kim Bauer, the Staples customer service person who generated the email. After he got the gist of what she had read he went to Walden’s office and asked him about it. Espieg testified that Walden said that he knew what Espieg knew based on the email and the information that he had gotten. Espieg told Walden that they did not need this driver to deliver to any Staples stores. Espieg testified that within 1 or 2 weeks of talking to Walden he spoke with Dooley. Espieg does not recall how the conversation began but recalls telling Dooley the same thing that he had told Walden “based on the information that we violated—or attempted to violate some security policy and upset some store managers. And it’d gotten all the way to a regional vice president for Staples that we could no longer have this individual delivering [to] Staples stores. (Tr. 272–273.) Notwithstanding the transcript, I believe that the accurate version is “based on the information we [Staples] had they [the Respondent] violated etc., etc.

Dooley recounts that he and Espieg were meeting on other matters. As Dooley was leaving he told Espieg that he understood from Walden that Espieg did not want the driver back at the Texas store. According to Dooley, Espieg said “no, I told him (Walden) that I did not want him (the driver) back at any store.

The parties agree that the counsel for the General Counsel must once again meet the burden under *Wright Line*. The counsel for the General Counsel contends that it has already been established that Burt was engaged in union activity, that the Respondent knew about that union activity, and that the Respondent had demonstrated union animus. The counsel for the General Counsel argues that it has also been established that in response to Burt’s union and protected concerted activities, the Respondent issued Burt a final written warning and that the warning was a pretext just as the Respondent’s proffered reasons for Burt’s termination are a pretext.

The Respondent argues that the counsel for the General Counsel has failed to met the burden in all respects. Alternatively, the Respondent contends that even if the burden has been met, the Respondent would still have discharged Burt because Staples would no longer allow him to deliver to Staples stores.

Before discussing the parties arguments there is one evidentiary matter that needs to be addressed. Towards the end of the trial the counsel for the General Counsel moved to admit the Respondent’s position statement dated June 3, 2009. (GC Exh. 11.) The statement was prepared by the Respondent’s General Counsel in response to the unfair labor practice charge filed by Burt. The Respondent objected to the admission of the position statement unless the Respondent was permitted to enter into evidence a second position statement that was also prepared by the Respondent’s General Counsel. That statement is dated June 11. The Respondent’s General Counsel writes that the statement is submitted as a supplement to the Respondent’s initial response (GC Exh. 11.) as well as

to provide the additional supporting documentation that was requested by the Board agent. (R. Exh. 16.)

The counsel for the General Counsel objected to the admission of the second statement citing § 13-243 of the NLRB Division of Judges Bench Book as revised September 2001 and with a 2005 supplement. (United States Government Printing Office 2001) It is noted that the Board has recently issued a revised edition of the Bench Book. For the purpose of this case there are no relevant changes. I conditionally admitted the second position statement and instructed the parties to argue its admissibility in their brief.

The first position statement presents a variety of information in response to the Board charges and explains the Respondent's reason for discharging Burt. The counsel for the General Counsel points to the paragraph in the statement where it is written that Burt was terminated for treating a customer in a rude and unprofessional manner, which resulted in the customer requesting that Burt be taken off the account if his unprofessional conduct did not cease immediately. This admission is repeated again in the second paragraph on the second page of the document. That paragraph also contains the statement that Walden completed an investigation and concluded that this was just another example of Burt's abusive behavior only worse because it was directed at a customer. The next, one sentence paragraph, states that based on all the foregoing Walden terminated Burt. I also observe that on the first page of the statement, in paragraph number 3, it is written that Burt was terminated "due to his abusive behavior towards our customer, and the customer's request that he be barred from servicing the account."

The second position statement attempts to correct the first by stating that "[i]n fact, John Espeig [sic], Staples' Transportation Manager informed Rand Walden, NFI's Facility Manager that Mr. Burt was not allowed to work on the Staples account as a result of his abusive behavior towards Staples' employees.

I find the counsel for the General Counsel's reliance on the Bench Book unpersuasive. It is not authoritative. The introduction specifically provides that "[n]or should [the Bench Book] be cited as binding precedent." (Bench Book, *supra* at 1.) I also disagree with the counsel for the General Counsel to the extent that she implies that the Bench Book's list of potential uses of position statements is exhaustive. I agree with the Board decisions, the Bench Book, and the counsel for the General Counsel, that a Respondent may not use its position statement to establish a point that it is required to prove. See, e.g., *Cannondale Corp.*, 310 NLRB 845, 852 (1993), *enf. denied* on other grounds 591 F.2d 1 (5th Cir. 1979). The question remains as to whether the Respondent is attempting to use its second position statement in a way that is prohibited.

Although the distinction between the two position statements relate to a point that, assuming the counsel for the General Counsel meets the *Wright line* burden, the Respondent is required to prove—that Burt was terminated for a lawful reason—it does not advance the Respondent's argument for a legitimate termination itself. Thus, under

either explanation the Respondent claims that Burt was terminated because of his inappropriate behavior rather than his protected concerted activity. Questions regarding the specific events that preceded Burt's termination, including whether Staples requested Burt's removal from their account or whether Staples' transportation manager ordered Burt's removal, do not alter the principle argument: that Burt was terminated because of his on-the-job behavior, not his union activity. Accordingly I find that the Respondent's is not using its second position statement to establish a point that it is required to prove.

The counsel for the General Counsel also argues that the second position statement should not be admitted because it is inadmissible hearsay, was not used to impeach, and was not used as an admission against interest. The Board has adopted a judges decision finding that statements made by attorneys representing parties are excluded from the definition of hearsay because of the very fact that they constitute admissions by a party-opponent. See *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1025 (2001), enfd. 309 F.3d 452 (7th Cir. 2002) (citing *McKenzie Engineering Co.*, 326 NLRB 473, 485 fn. 6 (1998), enfd. 182 F.3d 622 (8th Cir. 1996); quoting *U.S. v. DiDomenico*, 78 F.3d 294, 303 (7th Cir. 1996) ("Once made, 'a party should be entitled to rely on his opponent's statements.'") Notwithstanding the fact that the Respondent is offering a new statement to correct and supplement an earlier statement made in its own interest, I would find that the second statement should be admitted in order that the General Counsel may rely on the statement, although it was not made against the Respondent's interest.

Generally, the Board has held that hearsay evidence is admissible if "rationally probative in force and if corroborated by something more than the slightest amount of other evidence." *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994), quoting *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980). Here the claim in the second position statement, that the Staples transportation manager told the Respondent that Burt could no longer deliver to its stores, as opposed to the claim in the first position statement, that Burt be removed from its account if his unprofessional conduct did not cease immediately, is corroborated by the credited testimony of Espieg. That slight amount of corroboration is sufficient to make the hearsay evidence admissible in this proceeding. Accordingly, I find that the second position statement should be considered rationally probative and admissible in this context.

One of the responsibilities of an administrative law judge is to fully develop the record. E.g., *Bethlehem Steel Co. v. NLRB*, 120 F.2d 61, 652 (D.C. Cir. 1941). Both the position statements were submitted well before the complaint was issued. I can decide this case without resorting to the position statements. It is important, however, that they be made part of the record so that a reviewing authority will have access to the record as a whole. I affirm my ruling.

1. Discussion and conclusions

The counsel for the General Counsel argues that the Respondent's contention that Espieg banned Burt from the entire Staples account was a convenient afterthought. My

analysis of this discharge begins and ends with Espieg. Not only would Espieg have to be a part of any pretext, he has to play a major part. The record supports the following factual findings. Contrary to the counsel for the General Counsel's contention I find that the Staples' traffic manager has tremendous influence over how the Respondent's
5 operates its business. It is undisputed that none of Staples' traffic managers have been satisfied with the Respondent's work. I find that Dooley is a credible witness as long as he is not testifying about unions or protected activity. I also note that it is axiomatic that a witness may be believed as to some but not all of his testimony. E.g. *Kentucky River Medical Center*, 355 NLRB No. 129, 15 fn. 28 and cited cases (2010). Notwithstanding
10 the counsel for the General Counsel's protestations in brief, for the most part Dooley's testimony concerning the fragile relationship between the Respondent and Staples, was uncontested. Parris, a very credible witness, testified that the Respondent is no longer the favored company. Burt testified that Walden was afraid to say anything to Staples for fear of losing the account. Burt acknowledged that Walden was promoted instead of him
15 because Walden was a "Yes" man and would not confront Staples. The record is unclear as to whether the traffic manager could terminate the contract, but what is clear is that the Respondent was willing to discharge an employee at Staples' request. This fact is evidenced by Walden's undisputed testimony that he warned Trotzke that a Staples' employee was having a difficult time working with Trotzke and that if Staples asked to
20 have Trotzke removed he would have no choice but to comply. (Tr. 129-130 and R. Exh. 5.)

Although Walden discharged Burt at the behest of Glenn Deshields, the Respondent's director of human resources, it was Espieg's decision to ban the driver of
25 the truck who was the subject of the email. Because the only full-time employment available at the Respondent's Terre Haute facility was driving a truck for Staples, Burt, the driver of the truck, was effectively discharged.

Espeg was a very credible witness. His testimonial demeanor was that of a
30 sincere, straightforward individual who answered every question to the best of his ability. His demeanor was such that he gave the impression that he had absolutely nothing to hide. His testimony was consistent on direct as well as cross-examination. His cross-examination was brief and nothing he said or did while testifying gave me cause to question the trustworthiness of his testimony. I fully credit his testimony. There is no
35 evidence that Espieg relied on anything other than that which he testified about. Counsel for the General Counsel argues that it is obvious that Staples, and by implication Espieg, has an ongoing interest in the Respondent remaining nonunion. Counsel for the General Counsel cites Trotzke's testimony as the basis for that conclusion. Considering the state of the record I do not share counsel for the General Counsel's confidence that Trotzke
40 actually said what she thinks he said. Here is the relevant portion:

Q. Would you agree that the company would not want a union in there?

A. The NFI would not want a union?

45 Q. Right.

A. I don't know what the NFI would want.

Q. You're never heard?

A. In a general statement, yeah, they—

5 Q. No. I mean, have you heard—

A. Yes.

Q. —if they would want a union or not?

A. We would not prefer a union due to the Staples requirements, yes.

10

Q. Okay. Is there—in the contract with Staples, is there a requirement that you—

A. I have no idea.

Q. All right.

15 (Tr. 289–290.)

Assuming that Trotzke is claiming that there is a requirement in the contract that the Respondent remain nonunion, I do not credit his testimony. Trotzke is a dispatcher. I have neither seen nor heard any evidence that would give me reason to believe that he has any knowledge of the contract between the Respondent and Staples.

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Indeed, it is evident that knowledge appears to be the insurmountable obstacle that is directly in the path of the counsel for the General Counsel's pretext argument. None of the other inconsistencies can overcome the fact that Espieg knew nothing about "the driver of the truck." He did not know his work record, his discipline record, his union activity, his protected activity, or even his name. All Espieg knew was that he was the driver that caused Espieg to get on the radar screen of his regional vice president—and that was enough for Espieg. There is absolutely no credible incriminating evidence that Espieg was part of, or knew about, any pretext.

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It may well be that the Respondent was pleased to be rid of Burt because he was the primary union advocate. But as the Board stated many years ago in *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966):

35 The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.

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I find that the Respondent has met its rebuttal burden of showing that it would have taken the same action in the absence of Burt's union and protected activity. Accordingly, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it discharged

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Michael H. Burt on February 13, 2009, and I recommend that this portion of the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent NFI Interactive Logistics, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, International Brotherhood of Teamsters, local 135 is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act when:
 - (a) On about January 29, 2009, by Rand Walden, at its facility,
 - (i) it informed employees that it would be futile for them to select a union as their bargaining representative, and
 - (ii) it informed employees that it disciplined employees who engaged in protected concerted activities, including speaking with other employees about terms and conditions of employment.
 - (b) On about January 29, 2009, it issued written discipline to its employee Michael H. Burt.
4. Respondent violated Section 8(a)(3) of the Act when:
 - (a) On about January 29, 2009, it issued written discipline to its employee Michael H. Burt.
 - (5) The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically I shall recommend that the Respondent post a notice to employees in which it promises not to engage in like or related conduct which interferes with, restrains, or coerces, its employees in the exercise of rights guaranteed by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, NFI Interactive Logistics, LLC, Terre Haute, Indiana, its officers, agents, successor, and assigns, shall

1. Cease and desist from

¹ If no exceptions are filed as provided by Sec.102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec.102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Informing employees that it would be futile to select a union as their collective-bargaining representative.

(b) Informing employees that they are being disciplined for engaging in protected concerted activity, including speaking with other employees about their terms and conditions of employment.

(c) Disciplining employees because they engage in union and other protected concerted activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful January 29, 2009 final written warning issued to Michael H. Burt, and within 3 days thereafter notify him in writing that this has been done and that this discipline will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its Terre Haute, Indiana facility copies of the attached notice marked "Appendix A."² Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees, and former employees employed by the Respondent at any time since January 29, 2009.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(d) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 10, 2010

JOHN T. CLARK
Administrative Law Judge

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

